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No. 82-260

In the

Supreme Court of the United States

OCTOBER TERM, 1982

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER, AND ZELLA FERN FRAZIER,
Petitioners,

v.

JUDGE OF THE PUTNAM CIRCUIT COURT, et al.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that petitioners were not deprived of a constitutionally protected liberty interest without due process of law solely because after the deprivation had been consummated, the state allowed them to bring suit in its courts for redress, or whether the Court of Appeals should have applied the balancing test set forth in *Matthews v. Eldridge* to determine whether due process had been provided.

2. Whether, in light of *Patsy v. Florida Board of Regents*, the Court of Appeals correctly required petitioners to exhaust their state judicial remedies before bringing suit in federal court under 42 U.S.C. §1983.

3. Whether petitioners, as relatives and long-term *de facto* parents of four children, had a constitutionally protected liberty interest in maintaining the integrity of their families.

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ARGUMENT IN REPLY

A. The Court of Appeals' Decision Was Not Correct Simply Because It Reached the Same Conclusion As *Parratt v. Taylor* and *Ingraham v. Wright*

Respondents argue that the Seventh Circuit's decision is correct solely because it reached the same conclusion as *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Ingraham v. Wright*, 430 U.S. 651 (1977). They do not, however, address

the lower court's failure to analyze the competing interests and procedural alternatives within the factual context of the case. Nor do they address the significant factual differences between this case and *Parratt* and *Ingraham*.

Matthews v. Eldridge, 324 U.S. 319 (1976) established a three-part balancing test for determining whether a person had been deprived of liberty or property without due process of law. This test has been applied in every due process decision since *Matthews*, including *Parratt* and *Ingraham*. It was nonetheless rejected by the Seventh Circuit when it held that due process was satisfied solely because Indiana provided petitioners with adequate post-deprivation remedies through its judicial system.

In their Petition for Certiorari,[1] petitioners discussed the ramifications of the Seventh Circuit's abandonment of the *Matthews* test and that discussion need not be repeated here. It is sufficient to note that if the Seventh Circuit is correct, the continuing viability of *Matthews v. Eldridge* and most of this Court's due process decisions since 1976 is in serious doubt.

B. In Holding That Petitioners Were Not Denied Due Process of Law Because They Had Adequate Post-Deprivation Remedies, The Court of Appeals Required Them to Exhaust Their State Remedies

Monroe v. Pape, 365 U.S. 167 (1961) held that the federal remedy for constitutional violations was supplementary to any state remedy for the same misconduct, and that "the latter need not be first sought and refused before the federal one is invoked." *Id.* at 365 U.S. 183. Because the federal remedy is supplementary, the existence or non-existence of state remedies is therefore irrelevant to the question of whether there has been a deprivation of liberty or property without due process of law.

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[1]Petition, at pp. 12-17.

Both *Parratt* and *Ingraham* appear to be exceptions to this rule, because in each case the Court found that adequate post-deprivation remedies were all that due process required. These cases differ significantly, however, from the Court's other due process decisions and from the case at bar, because they involve negligent or unpredictable violations, rather than intentional, premeditated misconduct.[2]

This distinction has been recognized by the Seventh Circuit on two occasions, one before and one after *Parratt*. In *Kimbrough v. O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc) and *Madyun v. Thompson*, 657 F.2d 868, 873 (7th Cir. 1981), the Court held that an intentional deprivation of property stated a cause of action under 42 U.S.C. §1983, even though the plaintiff had adequate state procedural remedies to obtain the same relief.

Virtually all of the district courts which have considered this question after *Parratt* have reached the same result. *See, e.g., Pantoja v. City of Gonzales*, 538 F.Supp. 335 (N.D. Cal. 1982); *Howse v. DeBerry Correctional Institute*, 537 F.Supp. 1177 (M.D.Tenn. 1982); *Peters v. Township of Hopewell*, 534 F.Supp. 1324 (D.N.J. 1982) *Parker v. Rockefeller*, 521 F.Supp. 1013 (N.D.W.Va. 1981);

[2] *Ingraham* has also been cited for the proposition that where the constitutional violation is *de minimus*, due process requires nothing more than the availability of adequate post-deprivation remedies in the state judicial system. *See, e.g., Monsanto Company v. Kennedy*, 613 F.2d 947, 955 (D.C.Cir. 1979); *Martinez v. Posado*, 474 F.Supp. 758, 760 n. 8 (S.D.N.Y. 1979)

Tarkowski v. Hoogasian, 532 F.Supp. 971 (N.D.Ill. 1982);[3] *Sager v. City of Woodland Springs*, 543 F.Supp. 282, 293 n. 12 (D.Colo. 1982); and *Abraham v. County of Washoe*, 547 F.Supp. 548 (D.Nev. 1982). *Contra, Waterstraat v. Central State Hospital*, 533 F.Supp. 274 (W.D.Va. 1982) *Sheppard v. Moore*, 514 F.Supp. 1372 (M.D.N.C. 1981); *Spriggs v. City of Chicago*, 523 F.Supp. 138, 143, n. 5 (N.D.Ill. 1981).

Parratt and *Ingraham* thus constitute a narrow exception to *Monroe v. Pape*, and allow the consideration of state remedies only where the deprivation was *de minimus*, unpredictable, or negligent.[4]

In the case at bar, petitioners alleged that respondents acted intentionally.[5] Nonetheless, the Seventh Circuit held that due process was satisfied solely because Indiana allowed petitioners the post-deprivation right to sue for redress in its courts. It thus expanded the narrow holdings of *Parratt* and *Ingraham* far beyond their facts, and eviscerated the general rule that post-deprivation state remedies are irrelevant in determining whether due process has been provided.

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[3]Senior District Judge Hubert Will sat by designation on the Seventh Circuit panel which decided this case below, and concurred in Judge Posner's opinion. Two weeks later, he sat as a district judge and decided *Tarkowski v. Hoogasian*, 532 F.Supp. 791 (N.D.Ill. 1982). There, he wrote a scholarly opinion in which he cited both *Kimbrough v. O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc) and *Madyun v. Thompson*, 657 F.2d 868, 873 (7th Cir. 1981) for the proposition that where the deprivation was intentional, the adequacy of post-deprivation state remedies was not relevant. His opinion in *Tarkowski* was in direct conflict with his concurrence in this case, and may be indicative of the confusion in the lower courts about the true meaning of *Parratt v. Taylor*.

[4]Their amended complaint, which the district judge would not approve for filing, alleged that respondents acted deliberately and maliciously, and accordingly sought punitive damages.

[5]*Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. granted*, No. 81-1055, held that *Parratt* applied only to procedural due process, and was inapposite where substantative rights were at issue. *See, also, Hall v. Tawney*, 621 F.2d 607, 611-613 (4th Cir. 1980).

CONCLUSIONS

For the reasons set forth above and in the Petition for Certiorari, the petition should be granted to review the erroneous decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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